United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-7234

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BARBARA BOYD, et al., on behalf of themselves and all other persons similarly situated,

Plaintiffs-Appellants,

-against-

THE JUSTICES OF SPECIAL TERM, PART I, OF THE SUPREME COURT OF THE STATE OF NEW YORK, BRONX COUNTY, individually and in their official capacities, et al.,

Defendants-Appellees.

C.A. Docket No. 76-7234

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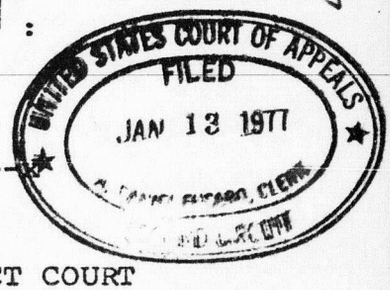

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING IN BANC

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UNITED STATES COURT OF APPEALS
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PETITION FOR REHEARING IN BANC

By this petition plaintiffs-appellants respectfully suggest that the above-entitled appeal, which was dismissed as moot by a panel of this Court (per Mulligan, Timbers, and Van Graafeiland, Circuit Judges) on December 30, 1976, be reheard by the Court of Appeals in banc pursuant to Rule 35 of the Federal Rules of Appellate Procedure, because the appeal involves a question of exceptional importance which has never before been addressed by this Court. That question, which has very recently been directly confronted and answered affirmatively by the Tenth Circuit Court of Appeals, is whether the Court of Appeals has the power to, and should, correct the error of the District Court in failing to reach and grant the plaintiffs' motion for class certification, due to that Court's erroneous dismissal of the named plaintiffs' claims,

with the inevitable result that the case became technically moot on appeal, and a constitutional issue affecting a class of thousands will recur yet escape review. See Napier v. Gertrude, 542 F.2d 825 (10 Cir., 1976).

NATURE OF THE CASE

The nature and background of this case, and the issues presented in the District Court and on appeal, will be only briefly discussed here, since they are extensively treated in the Brief for Plaintiff-Appellants (hereinafter "Brief") which was submitted to the panel of this Court which decided this appeal. This action was instituted as a class action in the District Court for the Southern District of New York pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) by thirteen indigent divorce litigants resident in Bronx County seeking declaratory and injunctive relief to vindicate their constitutional due process and equal protection rights to the assignment of counsel for indigent divorce litigants who need but are unable to secure the assistance of counsel in their divorce proceedings.* Each of the thirteen indigent named plaintiffs (12 prospective divorce plaintiffs and one divorce defendant) was wholly unsuccessful in obtaining counsel by her/his own diligent efforts. See Brief, pp. 4-14. Each was informed by the legal refer-

* Briefly stated, plaintiffs submit that the constitutional guarantee of assigned counsel for an indigent divorce litigant who needs but is unable to obtain a lawyer flows inevitably from the underlying premise of Boddie v. Connecticut, 401 U.S. 371 (1971), that the State must guarantee a divorce litigant a fully meaningful opportunity to be heard on her/his claimed right to the dissolution or preservation of the marriage relationship. See Brief at pp. 32-43.

ral services of both the Bronx County and New York City Bar Associations that no referral to a private attorney could be made because s/he could not afford to pay a fee. Each was told by the Bronx Office of The Legal Aid Society, the only legal services office in Bronx County which handles matrimonial matters, that it was unable to accept her/his case because of the office's heavy existing caseload. Ten of the named plaintiffs, along with fifty-one other indigent prospective divorce plaintiffs, thus applied pro se for and were denied assignment of counsel in Bronx Supreme Court. The pro se application of the divorce defendant for assigned counsel was also denied by Bronx Supreme Court. The remaining two named plaintiffs did not seek assignment of counsel in state court in view of the lack of success of their predecessors.

Urgently needing but unable to obtain the assistance of counsel in their divorce proceedings, these thirteen indigent matrimonial litigants thereupon commenced this class action in federal court. The plaintiffs moved for class certification and for the convening of a three-judge court. Included in plaintiffs' supporting papers were the affidavits of thirty-five additional indigent prospective divorce plaintiffs who were unable to secure counsel through their own efforts or by court assignment, and the affidavit of the Attorney-in-Charge of the Bronx Office of The Legal Aid Society explaining that due to heavy caseload and limited staff he is able to open his office

for matrimonial intake only one week a year and that approximately 8,750 to 10,000 indigent persons annually must be denied representation by that office in their divorce cases. (A-44). The defendants, in turn, moved to dismiss the action on a variety of grounds. Without reaching or discussing plaintiffs' class certification motion, District Judge Duffy dismissed this action in a two-paragraph decision stating, in its entirety:

> The Attorney General has informed me that New York State law already provides for the relief which the plaintiffs seek. It would appear therefore that there is not a case or controversy and, accordingly, the matter is dismissed.

During the ten months that passed between the time of the District Court's dismissal of this action and the argument of the appeal, the named plaintiffs' cases became moot due to the transpiring of an inevitable chain of events. When these named plaintiffs appeared at the Bronx Office of The Legal Aid Society during the one week per year when it is open to accept clients for representation in their prospective divorce actions, they were informed that their cases could not be taken due to the heavy pressure of existing staff caseload. However, they were placed on a waiting list for interview and representation on a first-come, first-served basis. Over the more than a year period which passed between the time they came to The Legal Aid Society and the time this appeal was argued in the Court of Appeals, the named plaintiffs inevitably rose to the top of the waiti.g list and were, of course, then represented in their divorce

actions by The Society. This eventual representation by the Bronx Office, albeit after a substantial period of time, was inevitable in the case of any named plaintiff in this action. However, the constitutional problem of lack of representation in their divorce actions will not disappear, and indeed is guaranteed to constantly recur, for the thousands of members of plaintiffs' class. Since the Bronx Office of the Legal Aid Society can only represent approximately 1000 persons per year in their divorce cases, and since approximately 8750 to 10,000 indigent persons are turned away annually, and since no other legal services office in the Bronx handles divorce cases, it is inevitable that hundreds, if not thousands, of indigent divorce litigants will never receive legal representation in their divorce actions. See affidavit of Michael D. Hampden (A-42). Unless they receive assigned counsel as a matter of constitutional right, those persons will either have to abandon their divorce actions or, especially if they are defendants and have no control over the course of litigation, prosecute or defend the actions pro se.

At oral argument of this appeal and in a post-argument letter, counsel for appellants argued that this Court, like the District Court, has the power, through operation of the "relation back" doctrine, to pass on the plaintiffs' class certification motion even after the named plaintiffs' cases had become moot. Thus, it had the power to reverse the District Court's erroneous dismissal

of the named plaintiffs' claims* and to remand the case back to the District Court with directions that it reach and grant plaintiffs' class certification motion and relate it back either to the filing or to the erroneous dismissal of the complaint to maintain a case and controversy between the unnamed class members and the defendants. Sosna v. Iowa, 419 U.S. 393, 402 n. 11 (1975); Gerstein v. Pugh, 420 U.S. 103, 110 n. 11 (1975); Napier v. Gertrude, 542 F.2d 825 (10 Cir., 1976

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* As the plaintiffs demonstrated in their appeals brief, neither the ground of required exhaustion of state judicial remedies relied on by the District Court nor the other grounds argued by the defendants can support the District Court's dismissal of the named plaintiffs' claims.

The panel of this Court which heard this appeal nonetheless held that it had no jurisdiction over and dismissed the appeal, expressing no opinion on the merits of any other issues. In apparent response to plaintiffs' argument, the panel opinion contains a footnote which concludes, erroneously, that this class action is not a proper one for the "relation back" of class certification.

ARGUMENT

This petition for rehearing of this appeal by this Court in banc should be granted because the panel which determined this appeal incorrectly decided an important question never before addressed by this Court. That question is whether the undisputed power of a District Court to hear a technically moot case by relating subsequent class certification back to the filing of the complaint implies a corresponding power of the Court of Appeals, in a case which has technically become moot on appeal, to reverse a District Court's erroneous dismissal of an action and to remand with directions that the District Court reach and pass on plaintiffs' motion for class certification and to relate the class certification back to the filing or dismissal of the complaint.

It is, of course, well settled that in proper cases the District Court has the power to certify the plaintiff class subsequent to the mooting of the named plaintiffs' claims and to relate that class certification back to the filing of the complaint to preserve the justiciability of the claims of the unnamed class members. Sosna v. Iowa, 419 U.S. 393, 402 n.11 (1975); Gerstein v. Pugh, 420 U.S. 103, 110

n. 11 (1975); Frost v. Weinberger, 515 F.2d 57, 63-64 (2 Cir., 1975), cert. denied, 424 U.S. 958 (1976). In Napier v. Gertrude, 542 F.2d 825 (1976), the Tenth Circuit Court of Appeals correctly held that in a case which has technically become moot on appeal the Court of Appeals has a corresponding power to reverse a District Court's erroneous dismissal of an action in a case where class certification properly relates back to the filing of the complaint. As the Napier Court observed, the Supreme Court has held that the class certification properly relates back to filing of the complaint depending "upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review." Sosna v. Iowa, supra, 419 U.S. at 402 n. 11. In Gerstein v. Pugh, supra, 420 U.S. at 110 n. 11, the Court further elaborated on the standards for determining when relation back is proper, concluding that the doctrine should be applied to a class of pre-trial detainees where the claim was "distinctly 'capable of repetition, yet evading review'," it was "by no means certain" that the case of any named plaintiff would remain alive long enough for a district judge to certify the class, and "the constant existence of a class of persons suffering the deprivation is certain" so that it could be "safely assume[d]" that the plaintiffs' attorney "has other clients with a continuing live interest in the case."

Following the suggestion at footnote 11 in Sosna, the Napier Court correctly held that if the Court of Appeals determines that

the underlying issue in the suit is "capable of repetition, yet evading review" the Court of Appeals should find that class certification relates back, has the power to correct the error of the District Court in failing to pass on class certification, and should reverse and remand the case for certification of the class.* That Court, however, went on to find that the issue involved in the particular case before it was not "capable of repetition yet evading review," and hence declined to exercise its power to reverse the judgment of the District Court and remand the case back for class certification. In sharp contrast, the instant case, because of the extraordinary circumstances underlying it, presents an issue which clearly is "capable of repetition, yet evading review" so as to require the Court of Appeals to reverse District Judge Duffy's erroneous dismissal of this action and to remand the case for the granting and relating back of class certification.

The issue of the constitutional right to counsel presented here is capable of repetition annually as to literally thousands of indigent prospective divorce litigants in Bronx County, and, further, if the error of the District Court in dismissing this action without reaching the class certification issue is not corrected by

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* Also, McGill v. Parsons, 532 F.2d 484 (5 Cir., 1976); Thurston v. Dekle, 531 F.2d 1264 (5 Cir., 1976); Inmates of San Diego County Jail v. Duffy, 528 F 2d 954 (9 Cir., 1975); Jones v. Diamond, 519 F.2d 1090 (5 Cir., 1975). Cf. Tedeschi v. Blackwood, 410 F.Supp. 34, 38-41 (D. Conn., 1976).

this Court, that constitutional issue will escape judicial review in both the state and federal courts. This class action suit was instituted in federal court because the state court is operatively unavailable, for several reasons, as a forum for adjudication of the constitutional issue. As plaintiffs demonstrated in their appeals brief, pp. 30-31, the ex parte orders of Bronx Supreme Court denying assignment of counsel to those plaintiffs who sought it were non-appealable to the Appellate Division as a matter of state law. More fundamentally, state appellate review is rendered a nullity by the authoritative and binding decision of the New York Court of Appeals in Matter of Smiley, 36 N.Y. 2d 433 (1975), that no federal or state constitutional right to assigned counsel obtains for indigent divorce litigants. See Brief at p. 47.

Thus, the plaintiffs in the instant case turned to the federal court as the forum of last resort. The District Judge, however, proceeded to ignore plaintiffs' motion for class certification and dismissed the action on spurious grounds of the required exhaustion of state appellate remedies, a rationale which was plainly erroneous. See Brief, at pp. 22-31. Further, the District Court's failure to reach the class certification motion was erroneous even if the named plaintiffs' claims were properly dismissed, since Rule 23(c)(1) of the Federal Rules of Civil Procedure mandates that the District Court determine the class issue "[a]s soon as practicable after the commencement of an action brought as a class action," and prior to and without regard to its decision on the merits. Napier, supra, 542 F.2d at 827;

Penn v. San Juan Hospital, Inc., 528 F.2d 1181, 1189 (10 Cir., 1975); Jiminez v. Weinberger, 523 F.2d 689, 697-702 (7 Cir., 1975), cert. denied, 44 U.S.L.W. 3754 (1976); Jones v. Diamond, 519 F.2d 1090, 1098-99 (5 Cir., 1975).

During the period of the pendency of the appeal, which was unnecessarily lengthened by the Attorney General's unexplained 3 1/2 month delay in the filing of his appellees' brief, the Bronx Office of The Legal Aid Society undertook, in the normal course of the first-come, first-served procedure utilized in that office in handling those divorce cases which it is able to take,* to represent the named plaintiffs in their divorce actions. With the passage of the long period of time which ensued between the institution of this suit and its hearing and determination on appeal, such representation and consequent mooting of the named plaintiffs' cases was inevitable.**

In light of the above-detailed unique circumstances of this case, this is the paradigm of a case for the relation back of class certification, at least to the time of the District Court's erroneous dismissal of this action. Hence the Court of Appeals plainly had the power, and should have exercised it, to reverse the District Court's

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* See affidavit of Michael D. Hampden, Attorney-in-Charge of that office. (A-42).

** Beyond this, the passage of a lengthy period of time before there is adjudication of their constitutional rights will tend to force many indigent divorce litigants to prosecute or defend their divorce actions without the assistance of counsel.

judgment and to remand the case back for the granting and relation back of class certification. As demonstrated above, the constitutional claim presented is distinctly "capable of repetition" as to literally thousands of indigent Bronx divorce litigants annually, and yet, absent class certification in federal court, will escape review in both federal and state court. By the same token, plaintiffs' counsel are aware of scores of other similarly situated indigent Bronx divorce litigants who equally suffer the constitutional deprivation challenged here. Cf. Gerstein v. Pugh, supra, 420 U.S. at 110 n. 11. Finally, counsel for the plaintiffs undertake to and will vigorously represent the class. Cf. Frost v. Weinberger, 515 F.2d 57, 64 (2 Cir., 1975). To hold that class certification should not relate back in this case and thus to conclude that this appeal was properly dismissed as moot would mean that the important question here at issue of an indigent divorce litigant's constitutional right to counsel would likely not be decided. And, as Judge Friendly observed in finding in favor of the relation back doctrine in Frost v. Weinberger, supra, 515 F.2d at 64, "[s]uch a principle could have little to commend itself."*

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* The panel opinion in this case suggests, in a footnote, that the cases cited by plaintiffs to support "relation back" are inapposite because here the mootness problem developed after the District Court had dismissed the action, rather than because the named plaintiffs' cases mooted before the District Court could reasonably be expected to rule on the class certification motion. In so reasoning, the panel ignored the instruction of the Supreme Court in Sosna, supra, 419 U.S. at 402 n. 11, that application of the relation back doctrine should proceed on a case-by-case basis depending "upon the circumstances of the particular case." Thus,

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(footnote cont'd from previous page)

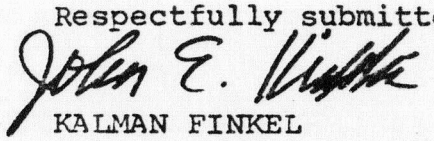
the panel erred in casting in stone the particular facts of a few decided cases as the complete measure of when relation back is proper, and in ignoring the unique circumstances of this case. Indeed, it is anomalous at best to apply the relation back doctrine in cases where pre-certification mootness occurred because the District Court, with the agreement of the parties, deferred ruling on the class motion (Frost v. Weinberger, supra, 515 F.2d at 63), but not to apply it where, as here, pre-certification mootness occurred because the District Court precipitously and erroneously dismissed the named plaintiffs' claims. Also, while not wishing to impute a motive to the extreme tardiness of the Attorney General in filing his appeals brief, we believe that it is significant here that the defendants' conduct exacerbated the delay which allowed the named plaintiffs' cases to become moot on appeal.

CONCLUSION

For the reasons stated above, plaintiffs-appellants respectfully request that this appeal be reheard by this Court in banc.

Dated: New York, New York
January 13, 1977

Respectfully submitted,



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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 319—September Term, 1976.

(Argued December 16, 1976 Decided December 30, 1976.)

Docket No. 76-7234

BARBARA BOYD, *et al.*, on behalf of themselves and all other persons similarly situated,

Plaintiffs-Appellants,

—against—

THE JUSTICES OF SPECIAL TERM PART I, OF THE SUPREME COURT OF THE STATE OF NEW YORK, BRONX COUNTY, individually and in their official capacities, *et al.*,

Defendants-Appellees.

Before:

MULLIGAN, TIMBERS and VAN GRAAFEILAND,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Kevin T. Duffy, *Judge,* dismissing the complaint.

Appeal dismissed as moot.

JOHN E. KIRKLIN, Director of Litigation, Legal Aid Society, New York, New York (Kalman Finkel, Attorney-in-Charge, Legal Aid Society, Civil Division, New York, New York;

Michael D. Hampden, Attorney-in-Charge, Legal Aid Society, Bronx, New York), *for Plaintiffs-Appellants.*

(Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, Rosalind Fink, Michael P. Fogarty, Assistant Attorneys General, of Counsel), *for Defendants-Appellees.*

PER CURIAM:

Some thirteen individuals who are allegedly indigent brought an action in the United States District Court for the Southern District of New York in December 1975 pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) seeking declaratory and injunctive relief against all the Justices of Special Term, Part I of the Supreme Court of the State of New York, Bronx County, to vindicate plaintiffs' claimed constitutional right to the assignment of counsel in their state divorce proceedings. The plaintiffs moved for certification of the action as a class action and also for the convening of a statutory three-judge court. In response, the defendants moved for dismissal on various grounds. On April 20, 1976 District Judge Kevin T. Duffy, finding that there was no case or controversy, dismissed the action. It is conceded that the named plaintiffs are currently represented in their divorce proceedings by counsel appointed by the Bronx office of the Legal Aid Society. Since the plaintiffs now have the relief which they sought in their federal action, counsel for their matrimonial litigation in the state court, we have no jurisdiction. "[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971). No class action

was certified below. Therefore appellants are not within any relaxation of the mootness doctrine provided by *Sosna* v. *Iowa*, 419 U.S. 393 (1975). *Board of School Commissioners* v. *Jacobs*, 420 U.S. 128 (1975).

Appellants' counsel argues that dismissal will only involve the bringing of a new action which will presumably add to the burgeoning calendars of the district court. We are therefore urged to forget that the case is moot and either decide the merits or direct the court below to call for a statutory three-judge court.[1] Since article III of the Constitution provides that we only have jurisdiction over cases and controversies, we have no power to act and thus dismiss this appeal. The Attorney General of the State of New York, who submitted a brief but did not argue, has asserted a variety of defenses to this action but not the mootness issue. We express no opinion upon the merits of the issues raised by either of the parties.[2]

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1 28 U.S.C. § 2281, on which appellants' demand for a three-judge court is based, was repealed by P.L. 94-381 (Aug. 12, 1976). The earlier statute does stay in effect for all litigation commenced before August 13, 1976. Since this action began in December 1975 appellants' 28 U.S.C. § 2281 request would still be alive if the action presented a case or controversy.

2 This is not a case in which certification of the class action can be related back to the date of the filing of the complaint so as to keep the controversy alive. See *Gerstein* v. *Pugh*, 420 U.S. 103, 110 n.11 (1975); *Sosna, supra*, 419 U.S. at 402 n.11. The relation back exception created in *Gerstein* and *Sosna* contemplates controversies so transitory that mootness inevitably intervenes before the District Court can "reasonably be expected to rule on a certification motion". Such was not the case here.

Nor do we think that *Frost* v. *Weinberger*, 515 F.2d 57, 62-65 (2d Cir. 1975), cert. denied, 424 U.S. 958 (1976) (Friendly, J.), requires us to apply the relation back exception in this case. A mootness problem arose there because an administrative proceeding ordered by the District Court as interim relief for the named plaintiff was concluded before the District Court completed the business of certifying the class. In the instant case the circumstances leading to mootness occurred after the District Court had dismissed it and arose as the result of independent action taken by the named plaintiffs and their counsel.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BARBARA BOYD, et al.,

Plaintiffs-Appellants,

-against-

THE JUSTICES OF SPECIAL TERM, et al.,

Defendants-Appellees.

C.A. Docket No. 76-7234

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JOHN E. KIRKLIN, being duly sworn, deposes and says:

1. I am not a party to this action, am over 18 years of age, and reside at 547 1st Street, Brooklyn, New York.

2. On January 13, 1977, I served the plaintiffs-appellants' petition for rehearing in banc in the above-entitled appeal upon Michael P. Fogarty, Assistant Attorney General, attorney for defendants herein, at 2 World Trade Center, New York, N.Y. 10047, the address designated by said attorney for that purpose, by depositing 2 true copies of same enclosed in a post-paid properly addressed envelope in an official depository under the exclusive care and custody of the United States Postal Service within the City of New York.

John E. Kirklin
JOHN E. KIRKLIN

Sworn to before me this
13th day of January, 1977.

GUY W. CERMANO
Notary Public, State of New York
No. 52-4510036
Qualified in Suffolk County
Term Expires March 30, 1977